IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of the State of New York (Appendix A) affirming a decision and judgment of the Appellate Division,

First Judicial Department, of the Supreme Court of the State of New York (Appendix B) which affirmed a decision and judgment of the Court of General Sessions, New York County, of the State of New York (R. 781-789, 802-822).*

Opinion Below

The Court of General Sessions rendered no formal opinion. Its oral decision is contained in the Record at folios 781-789, and its oral judgment at Record folios 802-822. The opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 10 App. Div. 2d 315 and is set forth herein as Appendix B. The opinion of the Court of Appeals of the State of New York, not yet officially reported, is set forth herein as Appendix A.

Jurisdiction

The decision, judgment and remittitur of the Court of Appeals of the State of New York, the highest tribunal in the State, was entered on April 27, 1961. The remittitur was amended and the amended remittitur was entered on July 7, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257. Petitioner's cause is founded upon rights secured by the Constitution of the United States, and specifically the Fourteenth Amendment thereto.

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* References are to the Record on Appeal in the New York Court of Appeals.

Question Presented

This case raises the single question whether a state may, consistent with the Fourteenth Amendment to the Federal Constitution, compel a witness before a legislative investigation committee to testify regarding information acquired by the state through the means of an electronic eavesdropping device, concealed in a room at a state penitentiary set aside for conferences between the prisoners and attorneys and relatives and where the witness conferred with his incarcerated brother.

Statement of the Facts

This case arises out of conduct on the part of officials of the State of New York that can only be described as unconscionable and reprehensible, and that has shocked the conscience of every forum—judicial, legislative and public opinion—that has had occasion to react to it.

On February 5th, 1957, Joseph Lanza, brother of the petitioner herein, was arrested on a warrant charging him with violation of parole (fol. 196). Joseph Lanza was thereupon imprisoned in the jail of Westchester County. At the request of Parole Board officers, the Sheriff of Westchester County, members of his staff, and officials in charge of the jail installed a concealed electronic microphone, connected to a recording device, in a room in the jail normally set aside for private consultations and conferences between the prisoners, their attorneys, relatives and friends. Between the period from February 5th to February 19th, a number of conversations between Joseph

Lanza and his attorney, his wife, and his brother, the petitioner herein, respectively, were thus recorded (fols. 525, 509-512, 580-581; *Lanza* v. *New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101; Report of the Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, 99, 24-25). Specifically involved in this case is the recorded conversation between Joseph Lanza and the petitioner herein held on February 13th, 1958 (fol. 22).

On or about February 19th, 1957, Joseph Lanza was restored to parole by Decision of James Stone, a member of the Parole Board (fol. 198). This action by Commissioner Stone gave rise to an investigation by the Joint Legislative Committee on Government Operations (hereinafter referred to as the Joint Committee) (fols. 195-200, 264-273). The Joint Committee was originally created by a resolution of both houses of the Legislature in 1955. Its existence was thereafter extended from year to year and its powers broadened by action of the Legislature (fols. 150-153).

Transcripts of the recorded conversations between Joseph Lanza and his wife, attorney and brother came into the possession of the Joint Committee and each of the four of them was summoned to appear before the Committee for questioning. All four refused to answer questions put to them by counsel for the Committee arising out of the intercepted conversations. No punitive action was taken against either Joseph Lanza or his wife. An effort was made to adjudicate the attorney guilty of contempt but the New York Appellate Division affirmed a lower court decision holding that the attorney was not guilty of contempt in his refusal to answer the questions (*Matter of Reuter (Cosentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534).

Harry Lanza, the petitioner herein, was called before the Joint Committee for questioning on three occasions. The first was in executive session, the second at a public session (fol. 559). In the course of the second session, the Joint Committee voted that proceedings to punish him for contempt be instituted against him (fols. 283-289, 573-579). Thereafter, on June 19, 1957, he was again called before the Joint Committee and nineteen questions were put to him, all of which he refused to answer (fols. 282-321).

The Joint Committee voted to grant immunity to the petitioner, but (on advice of his counsel) the petitioner persisted in his refusal. The petitioner was thereafter indicted for nineteen violations of Section 1330 of the New York Penal Law (refusal to testify before a legislative committee) and, after a trial without a jury, was found guilty on all counts. He was sentenced to imprisonment for one year on each of the counts, but nine of the sentences were ordered to be served concurrently with the other ten, which were ordered to be served consecutively, so that the net term for which petitioner was sentenced was ten years (fols. 806-817), a sentence modified by the Appellate Division to run concurrently, and as so modified was affirmed. The Court of Appeals, the State's highest court, affirmed the conviction by a bare majority vote of four to three.

The Manner in Which the Federal Question is Raised

The Federal question raised in this case was presented to the New York Appellate Division in petitioner's brief before that Court (pp. 27-35), at the oral argument before that Court, in petitioner's brief before the New York Court of Appeals (pp. 26-33), and in oral argument before that

Court. In each case the Court considered the Federal question and determined that no Federal right of the petitioner had been infringed.

Reasons for Issuance of the Writ

We submit that the Court of Appeals decided a substantial question regarding the Federal Constitution in a manner not in accord with the applicable decisions of this Court. We urge (1) that the question is of substantial and general importance, and (2) that it was decided erroneously by the Court below.

1. *The decision below raises a Federal question of substance and general importance.*

This case represents the first instance in which there has been presented to this Court the question of the constitutional power of a state to use information acquired through an electronic eavesdropping device secreted in a room in a jail which the state impliedly represented could be safely used by prisoners to confer with their counsel, relatives and friends.

The proliferation of the use of electronic eavesdropping devices, vividly described by the Court as "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society" (*Silverman* v. *U. S.*, 81 S. Ct. 679, 681 (1961)), is a matter of common knowledge. Even in the absence of other circumstances, their use by Federal law enforcement officials was condemned by this Court as a violation of the Fourth Amendment (*ibid.*).

When combined with the entrapment [1] present in the instant case, the consequences are even more frightening.

The consequences of such conduct on the part of law enforcement officials—if the judgment of the New York Court of Appeals is allowed to stand—can be gauged by a report that after the incident at the Westchester County jail became public, a New York judge found it necessary to release a prisoner held without bail so that he would have an opportunity to consult with his attorney, since the judge could not be sure that there was any jail in the state where the prisoner could feel secure against electronic eavesdropping. (New York Times, June 26, 1957, p. 64, col. 1, cited in Comment; "Abolition of Eavesdropping Exception to the Attorney-Client Privilege," 27 Fordham Law Review 390 (1958).)

If the decision of the Court below is permitted to stand, it may be assumed that prosecuting officials in other states will follow the lead of New York and that electronic eavesdropping devices, or "bugging" traps, may become established practice in consultation rooms of state penitentiaries.

2. *The Court of Appeals decided the Federal question in a way not in accord with the applicable decisions of this Court.*

The action of the state officials in causing the conversations between Joseph Lanza and his wife, brother and attorney to be electronically intercepted and recorded in the Westchester County jail was immoral and reprehensible. There is hardly a forum which has reacted to it that has not been shocked by it and has not condemned it.

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1. The Chairman of the New York Joint Legislative Committee on Privacy of Communications stated that "at the request of Parole Board Officers, a 'bugging' trap was set for Lanza and his family." N. Y. Legislative Document (1958) No. 9, p. 24.

The New York Appellate Division, in its opinion of affirmance, termed the action as "reprehensible and offensive" (fol. 885). Earlier it had called the action "gross and inexcusable" (*Lanza* v. *New York State Joint Legislative Committee*, 3 A. D. 2d 531), and "flagrant and unprecedented" (*Matter of Reuter* (*Cosentino*), 4 A. D. 2d 252, 255, 164 N. Y. S. 2d 534). The Court of Appeals characterized it as a "gross wrong" (*Lanza* v. *New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101). The counsel for the Joint Committee made no effort to justify or even excuse the action, but on the contrary himself called it "repulsive and repugnant" (*ibid.*). The Governor of New York called it "unwholesome and dangerous" (McKinney's 1958 Session Laws of New York, p. 1875). The Chairman of the New York Joint Legislative Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned about * * * efforts to protect the people's right of privacy" (Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, p. 25).

The most striking indication of the extent and degree to which the conscience of the community was shocked by the incident at the Westchester County jail was the enactment of Article 73 of the Penal Law of New York entitled "Eavesdropping," by Chapter 881 of the Laws of 1957. This statute made it criminal offense to do what the Westchester County jail officials did.[2]

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2. Article 73 declares "eavesdropping" to be a felony and declares that the crime is committed, *inter alia*, by one "not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another without the consent of a party to such conversation or discussion. * * *"

Article 73 was enacted with remarkable speed after the Westchester County jail incident became known. The incident became public towards the end of February, 1957. On March 21st (before the petitioner herein was questioned by the Joint Committee), a conference was held between leaders of the Legislature and Counsel to the Governor and the text of the proposed law was agreed upon (Report of New York State Joint Legislative Committee to Study Illegal Interception of Communications, Legislative Document (1957) No. 29, p. 28). The bill was then quickly adopted by the Legislature and approved by the Governor, as Chapter 881 of the Laws of 1957 (*ibid.*, p. 34). The speed with which the statute was adopted after the incident became known—a speed which can be explained only in terms of spontaneity—attests to the deep revulsion experienced by the people of New York by reason of the incident. If, as it is generally assumed, law reflects the moral standards of the community, there can be little doubt that the people of the State of New York deemed the conduct of the jail officials to be grossly immoral.

The Legislature, reflecting the indignation of the public, left no doubt as to who was intended to be encompassed by the prohibition. In language for which we have been unable to find any precedent, the statute expressly defines the word "person" to include "any law enforcement officer." A more emphatic repudiation of the conduct of the jail officials can hardly be conceived.

It is of course true that the action of the Westchester County jail officials was not illegal or criminal when it took place. However, the fact is, if not irrelevant, certainly not determinative insofar as the Fourteenth Amendment is concerned. The entire purpose of the Amendment was to

forbid conduct that state law permitted. The Amendment would be meaningless if its mandate could be avoided by the simple process of enacting a state statute legalizing what would otherwise be a deprivation without due process. This, at least, is how this Court has consistently interpreted the Amendment. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Leyra* v. *Denno*, 347 U. S. 556 (1954).

In any event, whatever doubt may have existed on this score has been laid to rest by the recent decision of this Court in *Silverman* v. *United States*, 81 S. Ct. 679 (1961), wherein it was specifically held immaterial that the police official's acquisition of information by electronic eavesdropping did not violate either the statutory law of the Federal Communications Act or the common law of trespass.

The Court of Appeals' per curiam opinion of affirmance did not discuss the substantive issues of the case, limiting itself to the question of the correctness of the sentence. The Appellate Division, however, indicated clearly that the basis of its decision was that "Material evidence obtained by illegal means is nevertheless admissible" (fol. 885), and it may be assumed that this too was the basis of the affirmance by the majority in the Court of Appeals.

Even before the decision of this Court in *Mapp* v. *Ohio*, 29 U. S. Law Week 4798, this did not constitute a correct statement of the applicable Federal constitutional law as expressed by this Court. In *Rochin* v. *California*, 342 U. S. 165 (1952), in unanimously upsetting a state conviction based upon the use as evidence of morphine tablets forcibly removed from the defendant's stomach by means of a pump, this Court said:

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* • • •

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained • • • (Due process imposes) *the general requirement that the States in their prosecutions respect certain decencies of civilized conduct*" (pp. 169-173). (Emphasis added.)

Due process of law, the Court said further in the *Rochin* case, bars use by the state of information acquired by methods that "offend the community's sense of fair play." The due process clause came into our constitutions as the culmination of a long struggle to impose upon government those obligations of decency and fair play that the community has the right to expect from the agency of society which fixes by the force of law the moral standards of the community. (See, *Pfeffer, The Liberties of an American*, 153-159.)

Even closer in point is the case of *Leyra* v. *Denno* (347 U. S. 556), a case which, we suggest, presents exactly the same issues of constitution and conscience that are found in the present case. In that case a confession was obtained in a police station through apparently sympathetic and solicitous interrogation by a psychiatrist who was introduced to the suspect by the police as a physician who was going to give him medical relief from his mental sufferings. Police officials were secreted in an adjoining room and were able by means of an electronic microphone and recording

machine (as in the present case) to listen to and record the conversation between the two. At the conclusion of the conversation, the officials immediately came into the room and, on the basis of the admissions of guilt made orally to the psychiatrist, they were able to induce the accused to sign a full confession. The Court found the fundamental facts in the case to be indistinguishable from those in the *Rochin* case, and held violative of the "due process" clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

Leyra v. *Denno*, we submit, is indistinguishable from the present case. In both guile and deceit were utilized. In both a relationship of trust existed. In both the immorality at the source tainted the secondary product (the signed confession in *Leyra*, the questions put to the petitioner in the present case).

Leyra v. *Denno*, we submit, required the reversal of the judgment of conviction in the present case. But *Mapp* v. *Ohio*, *supra*, certainly removes any doubt that might otherwise exist. Although not cited in the opinion of the Appellate Division, it is clear that the decision of that Court was based on *Wolf* v. *Colorado*, 338 U. S. 25 (1949). The New York decisions cited by the Appellate Division themselves relied upon *Wolf* v. *Colorado*, at least as far as the Fourteenth Amendment is concerned.

Silverman v. *United States*, *supra*, establishes that the conduct engaged in by the state authorities in the visitors' room at the Westchester County jail would have constituted a violation of the Fourth Amendment had it been committed by Federal authorities. *Mapp* v. *Ohio* makes it clear that such conduct is likewise forbidden to the states by the Fourteenth Amendment and that information obtained by

a state in violation of the Amendment may not be used by it against the consent of the person wronged by the violation. What the Court said in *Mapp* v. *Ohio* (29 U. S. Law Week at 4803) is particularly applicable here:

> "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It need hardly be stressed that it is constitutionally immaterial that the information illegally acquired herein was sought to be used by a legislative committee rather than a judicial tribunal. The mandate of the Fourth and Fourteenth Amendments extends to all agencies of government. The right of privacy, that most important of rights of civilized men, is as vulnerable to invasion by legislative investigating committees as by prosecuting officials, and requires constitutional protection in the one case no less than in the other.

Nor is it material that the petitioner in the present case was offered immunity from prosecution. The issue is not whether the illegally acquired information may be used as evidence against the victim of the invasion of privacy in a criminal proceeding; if it were, the offer of immunity might be relevant. The issue is whether the government may use such information to coerce additional information from the victim. This, we submit, it may not do. As this Court said in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the Court, *but that it shall not be used at all.*" (Emphasis added.)

Conclusion

For the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

(Decision and Judgment of the Court of Appeals, State of New York)

COURT OF APPEALS

April 27, 1961

1 No. 379

The People &c.,
Respondent,

vs.

Harry Lanza,
Appellant.

Judgment modified in accordance with the memorandum herein and, as so modified, affirmed. The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People* v. *Riela*, 7 N Y 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed.

Appendix A

No opinion. All concur except Desmond, Ch. J., Dye and Fuld, JJ., who dissent and vote to reverse and to dismiss the indictment upon the ground that in view of the situation disclosed in *Lanza* v. *N. Y. S. Joint Legis. Comm.* 3 N Y 2d 92, the questions which defendant refused to answer were not "material and proper" ones within the meaning of §1330 of the Penal Law.

Amended by order of the Court of Appeals, July 7, 1961, to add the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant argued that the imposition of penal sanctions for his refusal to answer certain questions deprived him of liberty without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that defendant's constitutional rights were not violated.

APPENDIX B

(Decision and Judgment of the New York Supreme Court, Appellate Division, First Judicial Department)

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

March 1960

2382

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

HARRY LANZA,
Defendant-Appellant.

Appeal from a judgment of the Court of General Sessions, New York County, rendered February 20, 1958, convicting the defendant of nineteen crimes of Refusing to Testify (Penal Law, §1330), after a trial before Mullen, J. without a jury. On the basis of consecutive sentencing, the defendant received a total sentence of ten years in the Penitentiary.

McNALLY, J.:

This is an appeal from a judgment of the Court of General Sessions convicting defendant after a nonjury trial on

19 counts of refusing to testify (Penal Law, §1330) and imposing a sentence of one year of imprisonment in the Penitentiary of the City of New York on each count. The sentences imposed are consecutive as to each of 10 counts, and the remaining sentences are required to be served concurrently with the consecutive ones.

Defendant's brother, Joseph Lanza, was arrested for violation of parole in February, 1957, and was restored to parole during the same month by a Commissioner of the State Division of Parole. In June, 1957 the Joint Legislative Committee on Government Operations of the New York State Legislature was investigating the circumstances relating to the said arrest and restoration of parole. Defendant was summoned as a witness and at a hearing held on June 19, 1957 the committee offered him immunity from any prosecution which might result from his testimony and asked him a number of questions relating to efforts on his part to obtain his brother's restoration to parole and concerning a conversation between them apparently dealing with that subject. Despite the immunity offer and the committee's directions, defendant refused to answer any and all of the questions and assigned as ground for his refusals the privilege against self-incrimination. As a result of 19 such refusals the indictment followed.

Defendant attacks the judgment on four grounds: (1) the action of the state officials in causing the conversations between defendant and his brother to be electronically intercepted and recorded in the Westchester County Jail was immoral and reprehensible; (2) the questions put to defendant were not "proper" within the purview of section 1330 of the Penal Law; (3) the People failed to prove beyond a reasonable doubt that defendant's failure to answer was wilful; and (4) he was improperly convicted of 19

crimes; that only a single crime is involved and only one sentence may be imposed; in any event, the sentence is excessive.

In support of defendant's first contention, he adverts to the following facts. During the days immediately after Joseph Lanza's arrest for parole violation and while he was detained in an institution known as Eastview Prison in Westchester County, he had engaged in various conversations in one of the prison rooms with the defendant, with other relatives and with an attorney; that some of the conversations had been intercepted and recorded by a concealed mechanical device placed there by certain law enforcement officials other than the legislative committee. Included among the recorded conversations was one between defendant and his brother on February 13, 1957, which was the source of the questions asked of the defendant on June 19, 1957.

The said recorded conversations have been the subject of two cases decided by this Court. In one the court refused to enjoin the present legislative committee from making public the conversation (*Lanza* v. *New York State Joint Legislative Committee*, 3 A D 2d 531, *aff'd* 3 N Y 2d 92); in the other it was held that the attorney was not in contempt for refusing to answer before the State Commissioner of Investigation questions stemming from the recorded confidential talk. (*Matter of Reuter* (*Cosentino*), 4 A D 2d 252.) Those cases related to the attorney-client privilege and did not deal with the legality of the use of the evidence obtained by mechanical eavesdropping.

The interception and recording of the conversations had with Joseph Lanza occurred prior to the enactment of section 738 of the Penal Law and sections 813-a and 813-b of the Code of Criminal Procedure and were not then illegal. Defendant, nevertheless, argues the improprieties attend-

ing the interception and recording serve to make the questions propounded to the defendant improper within the meaning of the statute (Penal Law, §1330).

The materiality and propriety of any question within the scope of section 1330 is to be determined by its pertinency in the light of the subject matter of the inquiry before the committee. (*People* v. *Sharp*, 107 N. Y. 427, 455-456.) It is not nor can it be asserted that the questions underlying the counts herein were irrelevant on the subject matter of the committee's investigation.

It may be assumed that the interception and recording of the conversation between defendant and his brother were reprehensible and offensive. Material evidence obtained by illegal means is nevertheless admissible. (*People* v. *Richter's Jewelers*, 291 N. Y. 161; *People* v. *Defore*, 242 N. Y. 13, *cert. denied* 270 U. S. 657; *People* v. *Adams*, 176 N. Y. 351, *aff'd* 192 U. S. 585; *People* v. *Variano*, 5 N Y 2d 391, 394; *People* v. *Dinan*, 7 A D 2d 119, *aff'd* 6 N Y 2d 715.)

Defendant's reliance upon *Matter of Reuter* (*Cosentino*) (*supra*) and *Lanza* v. *New York State Legislative Committee* (*supra*) is misplaced. *Reuter* involved the privilege of attorney and client not here invoked. *Lanza* involved the same privilege and held it did not prevent publication by a third party of intercepted confidential matter passing between attorney and client.

Cases relied on by defendant involving compulsory incriminating testimony such as *Leyra* v. *Denno* (347 U. S. 556) and *Rochin* v. *California*, 342 U. S. 165) are beside the point. The constitutional privilege against self-incrimination is satisfied by statutory immunity coextensive therewith. Testimony compelled by virtue of a grant of immunity is not within the ambit of the constitutional privilege. (*People* v. *Sharp*, *supra*; *Matter of Knapp* v. *Schweit-*

zer, 2 N Y 2d 913, *aff'd* 357 U. S. 371.) The legislative committee was engaged in an investigation of matters including the detection and prevention of corrupt practices within the ambit of article 34 of the Penal Law which pertains to bribery and corruption. Section 381 thereof provides for compulsory testimony and immunity from prosecution on account of any matter or thing concerning which a witness testifies and proscribes the use of such evidence against him. The defendant was offered the immunity and thereby accorded the protection afforded by the constitutional privilege.

Defendant's reliance upon advice of counsel and his belief that he had a right to refuse to answer the questions does not preclude his conviction of the crimes here involved. Wilfulness was found by the trial court as a matter of fact and the record fully supports the finding.

We turn now to other grounds urged for reversal. Defendant argues the indictment alleges only a single crime, and, in addition, the sentence is excessive. Defendant seeks to equate his refusals to testify with a refusal to appear or a refusal to be sworn. We are not here concerned with the latter crimes. Defendant did appear and was sworn; we need not speculate on the effect of his failure to do either. Moreover, it is clear that each wilful refusal to testify on any separate subject constitutes a separate crime and will support the imposition of as many consecutive sentences as there are separate subjects. (*People* v. *Saperstein*, 2 N Y 2d 210.) However, we are of the opinion, in the light of the circumstances and the absence of any prior criminal record on the part of the defendant, that the total sentence imposed was excessive and that the sentences should have been made to run concurrently with each other.

Appendix B

It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People* v. *Faden*, 271 N. Y. 435, 444-445.)

The judgment of conviction should be modified, on the law, on the facts and in the exercise of discretion, by directing that the Penitentiary sentences imposed are to run concurrently and not consecutively, and, as so modified, affirmed.

All Concur.